Exhibit No. 7
Date 2-1-07
Bill No. SB 318

Senate Judiciary Committee **SB 0318** **2/1/07**

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I am a past president of the Western Montana Stockman's Association and currently the Western Director of the 700 member Montana Pilots' Association. I am here today as a member of these two organizations to voice my support for SB 318.

I have been an active Montana pilot and aircraft owner for 46 years. I owned a ranch west of Polson for 26 years, on which I constructed an airstrip and airplane hangar. The airstrip was mainly for my own use. Other pilots were welcome to use it, but I always had a concern if an aviator should be injured or killed during aircraft operations. The current ranch owner, although not a pilot, keeps the airstrip maintained. He would like to have people fly in, but until the current statute is amended by this bill, he feels forced to keep the airstrip closed to the public. Other ranchers and farmers are in the same situation.

Montana landowners are currently protected under Montana's recreational use statute for a large variety of recreational activities, but not aviation. In Montana there are airstrip property owners who would like to permit the private, non-commercial use of their airstrips for recreational purposes. There are others who are considering closing their airfields to public use because of concerns of personal liability. Public land managers have the same concern. **Maintained private airstrips are one of a pilot's best choices for an emergency or precautionary landing and they can facilitate the emergency evacuation of injured parties. Providing an incentive to a landowner to keep and maintain an airstrip is in the best interest for public safety.**

Recreational flying is a growth tourist industry in Montana, with pilots and their passengers coming from all over the country to participate in the Montana recreational experience. As this activity grows, more landing areas will be required to facilitate the dispersal of use over the landscape. Many airstrip owners would be amenable to opening their landing strips to the public, just as they allow other recreational uses like hunting and fishing, if it were not for the concern of being the subject of unfounded lawsuits.

It is difficult to measure the effectiveness of Montana's recreational use statute. In courts, the statute is only used as an affirmative defense when a lawsuit has already been filed. Attached is a summary of Montana cases where the recreational use statute was employed to protect the landowner. In all cases, the landowner prevailed. These are the only cases of record, so the statute must be acting as a deterrent to lawsuits.

In 2006, the State of Idaho amended its recreational use statute to include aviation as one of the enumerated recreational uses. This was the first state to do so. The legislation passed easily.

I urge you to give SB 318 a "do pass as introduced" recommendation.

Montana Case Law Interpreting Montana's Recreational Use Statute
University of Montana Law School analysis, November, 2006

Montana's recreational use statute is designed to encourage landowners to open their lands to the public by limiting landowner liability to recreational users. In the courts, the statute is only used as an affirmative defense when a lawsuit has already been filed. As a policy, the statute's true value can only be measured by the number of lawsuits it has prevented. Unfortunately, it is impossible to tell how many lawsuits a statute has prevented. However, as a general principle, Montana attorneys give great weight to statutory language. Furthermore, this statute has generated few cases, suggesting that it is quite a successful deterrent. Below is a summary of Montana cases.

Jobe v. City of Polson, 322 Mont. 157, 94 P.3d 743 (Mont.2004). In this case a fisherman fell through a rotten board on a dock owned by the city and was injured. The Supreme Court upheld the district courts determination that Montana's Recreational Use statute barred Jobe's negligence claim. The Court remanded the case to district court for a determination of whether or not the city's conduct rose to the level of willful and wanton misconduct. The Court noted, "A landowner's relief from liability can only be divested through "willful and wanton misconduct."" *Jobe* at ¶ 25. Willful and wanton misconduct is difficult to prove. In *Jobe* the court provided several definitions:

> "As correctly observed by the District Court, the term "willfully" is defined by statute. Section 1-1-204(5), *MCA*, states: "Willfully," when applied to the intent with which an act is done or omitted, denotes a purpose or willingness to commit the act or make the omission referred to. It does not require any intent to violate the law, to injure another, or to acquire any advantage." *Jobe* ¶ 17.

> ""Wanton," on the other hand, does not have a statutory definition, but in previous cases we have held it to be synonymous with "reckless." In *Wollaston v. Burlington Northern, Inc.*, we defined willful, wanton, or reckless conduct as an act for which "it is apparent, or reasonably should have been apparent, to the defendant that the result was likely to prove disastrous to the plaintiff, and [the defendant] acted with such indifference toward, or utter disregard of, such a consequence that it can be said he was willing to perpetuate it." *Wollaston*, 188 Mont. 192, 198, 612 P.2d 1277, 1280 (Mont. 1980)." *Jobe*, ¶ 18.

Saari v. Winter Sports, Inc., 314 Mont. 212, 64 P.3d 1038 (Mont. 2003). In this case a child, Jean Saari, went sledding with a church youth group at Big Mountain Ski Resort. They did not pay for lift tickets nor purchase or rent equipment from Winter Sports, Inc. who owns Big Mountain. Jean's inner tube went out of control and landed in a creek. The injuries Jean suffered caused her death. The Saaris sued Winter Sports, Inc. The Montana Supreme Court upheld the district court which found Winter Sports, Inc. was shielded from liability because of Montana's Recreational Use Statute. *Saari* largely overruled another Montana case, *Simchuk v. Angel Island Community Ass'n*, 253 Mont. 221, 833 P.2d 158 (Mont. 1992).

Dobrocke v. City of Columbia Falls, 300 Mont. 348, 8 P.3d 71 (Mont. 2000). In this case a woman was tripped by barb wire while walking on city property. The city argued the limited liability based on the recreational use statute. The Montana Supreme Court did not agree. "We cannot conclude that the general public would regard as reasonable that simply walking to and from ones home is one of the purposes contemplated by the recreational use statute. Rather than a recreational purpose, walking to and from ones home is an everyday, ordinary, and expected use of city property by one of its citizens. Accordingly, we hold that the District Court erred in granting the City's motion for summary judgment under the recreational use statute." *Dobrocke*, ¶¶ 78-79. I believe this defendant failed for two reasons. One, it is a city, whose property is available to the public anyway. Two, the facts indicated the plaintiff was merely walking her dogs. Had the plaintiff been engaged in a different type of activity, the result may well have been different.